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IN THE

# Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-ACTION LIFE LEAGUE, INC.,

*Petitioners*,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*,

*Respondents*.

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OPERATION RESCUE,

*Petitioner*,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL*,

*Respondents*.

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*On Writs of Certiori To The United States Court of Appeals For The Seventh Circuit*

## BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF THE PETITIONERS

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## INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is a public interest law firm. It has participated in the litigation of numerous cases concerning issues related to federalism and the First Amendment, including *United States v. Morrison*, 529 U.S. 598 (2000) and *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

CIR believes that the court below gave insufficient weight to federalism and free speech concerns in interpreting the Hobbs Act. This brief provides some historical perspective on the expansion of federal criminal law and examines the decision of the Seventh Circuit in light of those important federalism concerns, and in light of free speech concerns.[1]

## SUMMARY OF ARGUMENT

The Seventh Circuit concluded that the petitioners here "obtained" the "property" of women seeking abortion services by preventing them from obtaining those services. In doing so, it followed its own circuit authority, which significantly expanded the scope of the Hobbs Act so that it covers far more activity traditionally covered by state criminal law. Indeed, as we show below, that interpretation creates concerns with the constitutionality of the Hobbs Act altogether. The interpretation also appears to render Congress's passage of the Freedom of Access to Clinic Entrances Act largely unnecessary.

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1 Pursuant to Rule 37.2(a) of the Rules of this Court, all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The interpretation of the Seventh Circuit reads the "obtaining" of "property" as if it said "interference" with a "right." Laws that prohibit "interference" with a "right" are not unknown, but because "interference" is such a broad term, they are often difficult to interpret and/or are interpreted in a manner that creates First Amendment problems. Of course, such problems must be dealt with where Congress has passed a statute using words like "interference" and "rights." But it seems inappropriate to create such problems where Congress has used much simpler (and narrower) terminology.

## ARGUMENT

I. The Seventh Circuit's Holding Diverts Federal Criminal Law From Its Proper Purpose And Infringes On State Domain.

Under our Constitution, the intended and proper purpose of federal criminal law is to supplement the criminal law of the states by protecting federal interests. The protection of citizens is the task of the states. Over the course of roughly the last century, however, federal criminal law has moved away from its role as a supplement to state law and in the direction of a substitute police power. The Seventh Circuit continues this trend by holding that unlawful interference with abortion can be punished as extortion under the Hobbs Act, 18 U.S.C. § 1951. Such a holding effectively displaces state choices concerning the protections to be given to intangible rights.

### *A. The Original Role of Federal Criminal Law*

Prior to the addition of the Bill of Rights, the Constitution made scant mention of federal criminal law. It



vested Congress with the power to punish the counterfeiting of currency and securities of the United States, piracies and felonies committed on the high seas, and crimes violating the law of nations. U.S. Const. art. I, § 8. It enjoined both Congress and the states from passing bills of attainder or ex post facto laws, and provided for trial by jury in federal prosecutions and extradition of fugitives from justice. *Id.* art. I, §§ 9, 10. Beyond these specifics, however, the proper role and scope of federal criminal jurisdiction was unknown. The Constitution did not directly confer power to exercise criminal jurisdiction, and controversy surrounded the question of whether federal courts had jurisdiction over common-law crimes. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of Criminal Law*, 46 Hastings L.J. 1135, 1137 n.15 (1995). Accordingly, Congress's first forays into the realm of criminal law were marked by extreme caution.

The early federal criminal laws were only concerned with activity of special federal interest, such as conduct that injured or interfered with the federal government or its programs, or conduct occurring in areas of exclusive federal jurisdiction. The Crimes Act of 1790, for example, punished forgery of United States certificates, perjury in federal court, treason, acts of violence against ambassadors, as well as ordinary crimes committed within a fort, federal territory, or the District of Columbia. *Id.* at 1138. Through the mid-nineteenth century, what few federal property crimes there were concerned theft or destruction of federal property, such as revenue fraud, theft from a federal bank, or arson on a federal vessel. *Id.* at 1138-39. In general, where no specific federal interest could be identified, federal law did not reach crimes against individuals. Laws for the general protection of the citizenry fell squarely within the police power of the states. Consequently, for years following the

adoption of the Constitution in 1789, the states defined and prosecuted nearly all criminal conduct. American Bar Association, Criminal Justice Section Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law* 5 (1998) [hereinafter *ABA Report*].

Such an arrangement was consistent with the vision of the Framers. Writing to assuage antifederalist fears of strong national government, Alexander Hamilton stated that "the ordinary administration of criminal and civil justice" would be the "one transcendent advantage belonging to the province of the state governments" under the Constitution. *The Federalist* No. 17 (Alexander Hamilton) 104 (New York 1788) (Legal Classics ed. 1983). The fact that the states would be "the immediate and visible guardians of life and property" would render them "at all times a complete counterpoise . . . to the power of the union." *Id.* James Madison took Hamilton's analysis one step further. The ultimate beneficiaries of having the administration of criminal justice remain solely in state hands were not the states, but the people, since a "double security" to their rights would develop under a system in which neither sovereign encroached on the sphere of the other. *The Federalist*, *supra*, No. 51 (James Madison) at 119-20. *See also New York v. United States*, 505 U.S. 144, 154 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

*B. The Expansion of Federal Criminal Law*

Congress's first attempts to regulate criminal activity that did not directly involve federal interests were motivated by concerns about state enforcement. The post-Civil War civil rights acts, for example, established criminal sanctions for infringements of the rights they created because the



courts of some states could not be counted on to extend the protection of the laws to everyone. Even with that base, some laws were found unconstitutional. *E.g.*, *United States v. Harris*, 106 U.S. 629 (1882) (holding that Congress had no general power to punish a private citizen for an invasion of the rights of another and declaring criminal provisions of Section 2 of the Civil Rights Act of 1871 unconstitutional). However, more typical of the federal government's early efforts at the direct protection of private citizens were circumstances in which federal law could supplement state law by focusing on a particular federal interest. The Post Office Act of 1872, for example, forbade mailing lottery tickets or obscene matter, or using the mails to defraud. John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 Rutgers L.J. 495, 514 (1985). Though the effects of mail fraud and pornography were felt at the local rather than federal level, Congress was specifically empowered to regulate the postal system itself. Despite the fact that it protected citizens and not federal interests, the Post Office Act at least focused on a specific federal area of expertise.

An analogous development occurred in the area of interstate commerce as increased mobility brought new threats to state economies. In 1884, for instance, Congress forbade railroads and boat lines from accepting or transporting diseased livestock. Lawrence M. Friedman, *Crime and Punishment in American History* 116 (1994). Though Iowa tried to combat the spread of infectious disease with laws against driving diseased cattle into its territory, it could not criminalize the loading of the same cattle onto trains bound for Iowa when the loading took place in Texas. Thus, though the health of Iowa's livestock was hardly a federal interest, Congress's authority over interstate commerce allowed for a federal solution of greater breadth than any

given state itself could create.

Congress's focus, however, eventually began to shift from laws that would supplement state commercial regulations to ordinary local crimes. The Mann Act, for example, was an attempt to curb local prostitution by prohibiting the transportation of a woman across state lines for illicit purposes. Likewise the Dyer Act prohibited the interstate transportation of a stolen motor vehicle. Chief Justice Taft stated the rationale for such measures when he stated, "Elaborately organized conspiracies for the theft of automobiles and the spiriting of them away . . . have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny." *Brooks v. United States*, 267 U.S. 432, 438 (1925).

The Chief Justice's sentiments reflected the development of two trends that pushed the federal government away from its auxiliary role in the criminal law and in the direction of a substitute police power. First, the idea that Congress had been "roused" by automobile theft indicates that local crime had become a matter for national attention, which in turn meant an increased reliance on federalization as the solution to local problems. Second, as calls for increased federalization grew stronger, the crimes Congress chose to bring within the federal ambit became ever more tenuously linked to interstate *commerce*. After the Dyer and Mann Acts came the National Stolen Property Act (prohibiting transportation of stolen property across state lines), the Lindbergh Act (prohibiting the interstate transportation of kidnappees), and the Fugitive Felon Act (prohibiting interstate flight to avoid prosecution). Brickey, *supra*, at 1143-44.

Despite the demise of Prohibition and accompanying



disengagement of the federal government from one aspect of law enforcement, the federalization trend only accelerated from the New Deal onward. Indeed, the passage of the Twenty-First Amendment (repealing prohibition) led to a flurry of criminal legislation. *See generally* Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 228-35 (1984); Chamberlain, *Federal Criminal Statutes*, 20 A.B.A. J. 501, 501-03 (1934). One such statute was The Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569 (1934), which included language carried forward in the Hobbs Act. *See United States v. Culbert*, 435 U.S. 371, 375 n.5 (1978). The 1934 Act bears the distinction of being the "earliest explicit extension of federal criminal enforcement power based upon the effect upon commerce rationale." N. Abrams, *Federal Criminal Law And Its Enforcement* 38 (1986); *see also* Bradley, *supra*, 22 Am. Crim. L. Rev. at 233 (earlier legislation "required * * * either interstate travel or use of a facility of interstate commerce."). Indeed, the 1934 Act seemed designed to push the frontiers of Congressional authority to reach local crime. *See* Note, *Legislation*, 21 Va. L. Rev. 568, 569 n.7 (1935) (Congress "sens[ed] the tenuous nature of its power in this field [of racketeering]" and "provided for the punishment of persons whose acts 'in any way or in any degree' affect interstate commerce"); *id.* at 572 n.20 (similar language covering "acts in any degree affecting interstate commerce" in Trade Interference Act "is probably of little value. The effect of the acts prohibited must be more than incidental").

As Congress passed more laws based upon the "effects" of crime on interstate commerce, it relied on the more expansive interpretations of that branch of the commerce power that this Court provided. Thus, in *Perez v. United States*, 402 U.S. 146 (1971), this Court upheld the application of relevant criminal provisions of the Consumer

Credit Protection Act to the run-of-the-mill threatening collection practices of a loan shark. There was no tie to interstate commerce from the specific loan; it was sufficient for this Court that Congress had found that extortionate credit transactions generally are carried on to a substantial extent in interstate or foreign commerce.

With the advent of the omnibus crime bill, Congress utilized the "affecting commerce" theory and increased the rate at which it created new federal offenses exponentially. In the 1960's and 1970's, concerns about organized crime, drugs, street violence, and other social ills precipitated a particularly significant rise in federal criminal legislation dealing with local activity, including the Omnibus Crime Control and Safe Streets Act of 1968, the Organized Crime Control Act of 1970, and the Comprehensive Drug Abuse Prevention and Control Act (Controlled Substances Act) of 1970. As concerns about crime grew more acute in the 1980's and 1990's, Congress enacted the Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988, and the Violent Crime Control and Law Enforcement Act of 1994. In sum, more than forty percent of the federal criminal provisions enacted since the Civil War have been enacted in roughly the last thirty years. ABA Report, *supra* at 7. As of 1998, federal crimes were so great in number and so diffusely scattered throughout the United States Code that no readily accessible list of them existed. *Id.* at 9.

*C. Federal Duplication of State Criminal Law*

The explosion of Congressional activity concerning local crime has resulted in a situation in which federal criminal law now duplicates and supplants the law of the states. As an example, the Violence Against Women Act, which prohibits "travel across a state line . . . with the intent



to injure, harass, or intimidate [one's] spouse or intimate partner" (18 U.S.C. § 2261(a)(1)) has been used in place of state homicide laws to punish murders. *E.g.*, *United States v. Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998). Though the law invokes federal jurisdiction as soon as a state border is crossed, the limitations of human foresight make the law inapplicable until after harm has been done. In practice, therefore, the law fails to reach any activity not already within the purview of the states, and merely replicates state laws against violent crime. Such a situation arises out of the fact that the interstate travel element of the statute bears no logical relationship to the harm it seeks to prevent, and is merely used to create a "hook" to the Constitution. The essence of the proscribed conduct is the violent act itself, not the interstate movement.

Federal duplication of state criminal law is even more pronounced in the field of property crimes. Unlike the Violence Against Women Act, which nominally criminalizes only the act of interstate travel, the federal arson statute, 18 U.S.C. § 844(i), punishes arson itself, so long as the building affected is used in commerce. Consequently, except in areas of exclusive federal jurisdiction, § 844(i) cannot apply to any circumstance not already covered by state arson laws.

While redundant protections in theory need not be harmful, a criminal law uniformly applicable throughout the United States threatens to undo policy decisions made by state and local authorities. Often, federal and state prohibitions on the same activity carry substantially different sentences. *Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) ("The fact that petitioner received a sentence of 35 years in prison when the maximum penalty

for the comparable state offense was only 10 years illustrates how a criminal law like this may effectively displace a policy choice made by the State.") (internal citations omitted). Moreover, a general federal police power may result in federal prohibitions on activities that states and localities have consciously chosen *not* to outlaw, or even to protect. More fundamentally, it creates an overlap in authority that diminishes the protections to individuals that our system of divided sovereignty was intended to provide.

*D. The Effect of the Lower Court's Holding*

The Hobbs Act, 18 U.S.C. § 1951, reads as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> * * *
>
> (b)(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Ostensibly a prohibition on the obstruction of interstate commerce, the Hobbs Act effectively duplicates state



law against robbery and extortion. What is unique to the Hobbs Act, however, is that the expansion of federal criminal jurisdiction it enables is as much the work of the federal courts as Congress. By reading the "obtains property" provision broadly, appellate courts have brought an expansive range of activity previously regulated by state prohibitions on *coercion* (with much lesser penalties) within the definition of *extortion*. While the paradigmatic extortion scheme is a demand for money coupled with a violent threat, courts have extended the extortion prohibition of the Hobbs Act to intangible interests that more closely resemble civil liberties than property. The Fourth Circuit, for example, has held that "the right . . . to make a business decision free from outside pressure," is a form of property subject to Hobbs Act extortion. *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978). Likewise, the Third Circuit has held that the Hobbs Act protects the "right to democratic participation" in a labor union. *United States v. Local 560 of International Brotherhood of Teamsters*, 780 F.2d 267, 282 (3rd Cir. 1985). Holdings such as these have effectively created the federal crime of "coercion affecting interstate commerce," and thus run afoul of the fundamental rule that there is no federal common law of crimes.

The Seventh Circuit's holding in this case continues this trend. By interpreting "extortion" to include unlawful interference with the right to abortion, the court brings criminal activity previously regulated by the states into the federal sphere. In doing so, it displaces policy decisions made by the states concerning the punishment of those who interfere with intangible rights like the right to an abortion. Such a result exemplifies the problems of federal encroachment through criminal legislation. Where intangible rights are concerned, including the right to protest others' exercise of their rights, even to the point of breaching the peace, the

degree and type of protection given to one right from private interference has a profound effect on the exercise of others. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982). Accordingly, the state interest is particularly strong where private interference with intangible rights are concerned, and the ordering of those rights has always been a state prerogative. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-86 (1980) (upholding state interest in promoting more expansive free speech rights than conferred by the federal Constitution at the expense of property rights); *Miller v. California*, 413 U.S. 15, 30-34 (1973) (holding local norms regarding obscenity relevant to the limits of protected speech); *Hill v. Colorado*, 530 U.S. 703, 727 (2000) (deferring to state balancing of free speech and privacy interests). By holding that wrongful interference with another's right can be punished as extortion under the Hobbs Act, the Seventh Circuit has withdrawn punitive discretion from the states, and thereby undone state choices concerning the balance between rights.

The breadth of the Seventh Circuit's interpretation of the Hobbs Act can be illustrated by a few examples. All cases of *quid pro quo* sexual harassment would be Hobbs Act violations where (1) the perpetrators lead the victims to believe that they would lose their jobs or suffer some other economic harm if they failed to submit[2] and (2) some article in commerce is affected. Common law business torts of unfair competition frequently would be Hobbs Act violations if the victims had been induced to refrain from entering into transactions by others' suggestions that they will attempt to impose economic harm if the victims enter into the transac-

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[2] The court instructed the jury that the "fear" element of extortion under the Hobbs Act could be met by fear of economic harm. Scheidler Pet. App. 151a (quoting Tr. 4946).



tion. If a speaker in the public square is intimidated from speaking because of the menacing shouts of members in the audience, those audience members, too, will have violated the Hobbs Act under the Seventh Circuit's expansive definition.

Since the Hobbs Act also prohibits "official extortion," requiring no element of fear, violence, or threat, the Seventh Circuit's definition of "obtaining property" would also be relevant for that crime. Presumably, *any* act under color of state law that violates Section 1983 would be included so long as an article or commodity in commerce has been affected. Thus, the Hobbs Act could then serve as an alternative prosecutorial tool to Sections 241 and 242 of the criminal code, each of which require a "specific intent" to violate a particular federal right and "fair warning" of the federal right in question. *United States v. Price*, 383 U.S. 787, 806 n.20 (1966); *United States v. Lanier*, 520 U.S. 259, 266-67 (1997). As predicate acts under RICO, 18 U.S.C. §§ 1961 *et seq.*, the Hobbs Act violations could serve as an alternative to Section 1983, in which treble damages could be recovered. So, too, RICO could serve as a separate basis for suing federal officials who engage in misconduct, rendering the *Bivens* action altogether outdated for any pattern of misconduct.

## II. The Seventh Circuit's Holding Effects A Change In The Federal-State Balance Without A Clear Statement By Congress.

In bringing interference with the right to abortion within the parameters of the Hobbs Act, the Seventh Circuit ignored three of this Court's rules of statutory interpretation, those of preserving the federal-state balance, avoiding constitutional questions, and construing criminal statutes

narrowly (*i.e.*, with lenity). Because protection of economic and political intangible rights, particularly from private interference, fall within the state sphere, extending the reach of the Hobbs Act to include them requires a clear signal that Congress intended the law to reach them.

### A. *Statutes Should Be Read To Avoid Altering The Federal-State Balance*

As discussed above, over the last two centuries federal law has evolved from a few modest statutes protecting uniquely federal interests to a parallel system of criminal protections that applies not only where state law is inadequate, but in many circumstances where it is perfectly adequate. Nonetheless, as this Court recently and repeatedly has recognized, under our federal system the primary responsibility for defining and enforcing the criminal law still falls upon the states. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995). Accordingly, expansions of federal criminal provisions that do not directly protect federal interests necessarily alter the delicate balance between state and federal regulatory authority. To protect this balance, this Court has stated that it "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction" unless Congress makes clear an intent to do so. *United States v. Bass*, 404 U.S. 336, 349 (1971). In other words, where a "broad construction . . . renders traditionally local criminal conduct a matter for federal enforcement," a narrow construction is preferred. *Id.* at 350.

Congress passed the Hobbs Act in response to this Court's decision in *United States v. Local 807 of International Brotherhood of Teamsters*, 315 U.S. 521 (1942), which to some legislators seemed to "legalize in certain labor



disputes the use of robbery and extortion." 91 Cong. Rec. 11899-900 (1945) (statement of Rep. Hancock). The defendants in *Local 807* were convicted of having extorted payment in violation of the Hobbs Act's predecessor, the Anti-Racketeering Act of 1934. The 1934 Act, however, contained an exception for actors seeking "the payment of wages by a bona-fide employer to a bona-fide employee," which this Court properly interpreted as excluding labor organizers. As this Court stated, "[T]he elimination of terroristic activities by professional gangsters was the aim of the statute, and . . . no interference with traditional labor union activities was intended." 315 U.S. at 530. By removing the "bona-fide employer" provision but otherwise mimicking the language of the 1934 Act, Congress, in enacting the Hobbs Act, sought to eliminate the organized labor exemption of the older statute but preserve its substance.

The broad reading of "obtaining" and "property" adopted by the Court of Appeals in this case has thus resulted in the application to petitioners of a statute intended for "professional gangsters" engaging in "terroristic activities." Such a reading would be suspect even if it did not result in the federalization of activity traditionally regulated by the states. As commentators have observed, however, "all of the [petitioners'] actions are subject to regulation and prosecution at the state level." Stephan E. Oestreicher, Jr., *Scheidler Meets Morrison (At the Entrance to a Health Clinic)*, 35 Creighton L. Rev. 693, 712 (2002). Acts of trespass and disturbing the peace are now within the parameters of the Hobbs Act in the Seventh Circuit. Such a result is inconsistent with this Court's rule of preserving the state-federal balance by construing federal criminal statutes narrowly.

*B. Statutes Should Be Read to Avoid Constitutional Problems*

The rule discussed in the preceding section is, as this Court has observed, closely related to another rule of statutory interpretation, that of constitutional avoidance: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909), quoted in *Jones v. United States*, 529 U.S. 848, 857 (2000).

Recent opinions by this Court have clarified the rule in the context of statutes with a commerce "hook." In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court analyzed regulations promulgated under the Clean Water Act that extended the federal government's authority to all bodies of water large enough to be useful to migratory birds. The "Migratory Bird Rule" was an administrative interpretation; the Clean Water Act itself merely granted regulatory authority over "navigable waters." 33 U.S.C. § 1344(a). This Court held that the Migratory Bird Rule was an excessively broad reading of the authority granted by Congress, in part because Congress's own authority over mere mudflats and ponds was questionable. Under *United States v. Lopez*, 514 U.S. 549 (1995), Congress's authority to regulate activities "affecting commerce" within a sovereign state only reaches commercial activity that overall substantially affects interstate commerce and non-commercial acts with a distinct link to interstate commerce in the specific instance. *Id.* at 561-62. *But see Morrison*, 529 U.S. 598, 612 (2000) (a jurisdictional element "*may*



establish that the enactment is in pursuance of Congress's regulation of interstate commerce" (emphasis added)). While lakes and rivers that supported interstate shipping were within Congress's purview, an interpretation of "navigable waters" that authorized the Migratory Bird Rule would require the Court to "evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *SWANCC*, 531 U.S. at 173. Thus, because the Migratory Bird Rule would "invoke the outer limits of Congress's power," and "result in a significant impingement of the States' traditional and primary power over land and water use," a narrower reading of "navigable waters" was necessary. *Id.* at 172-74.

The earlier case of *Jones v. United States*, 529 U.S. 848 (2000) involved the same principle. The petitioner in *Jones* was convicted under the federal arson statute, 18 U.S.C § 844(i), of having thrown a Molotov cocktail into his cousin's residence. Section 844(i) made it a federal crime to destroy any property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The house Jones burned was supposedly connected to interstate commerce in three ways: a mortgage, an insurance policy, and deliveries of natural gas. In overturning Jones's conviction, this Court observed that a reading of "used in interstate or foreign commerce" broad enough to encompass the residence in question would arguably extend the protections of § 844(i) to every building in the United States. *Jones*, 529 U.S. at 857. Because such a reading would create problems under *Lopez*, this Court rejected it. *Id.* at 857-58.

Applied to the Hobbs Act, this rule of construction dictates an outcome contrary to that reached by the Seventh Circuit in this case. Interpreting "obtaining" of "property"

to include any interference with intangible rights expands the parameters of the Hobbs Act to encompass a significant amount of non-economic activity. Although that may not be impermissible if there is a jurisdictional element tying the act in question to interstate commerce in a significant way, the broad reach of the Hobbs Act jurisdictional element is very much like the one this Court had to read narrowly in *Jones* in order to avoid constitutional problems. That is, the broader the reach of the substantive definition of extortion, the more likely it is that this Court will have to read the jurisdictional element narrowly to avoid difficult constitutional issues. On the other hand, a narrow reading of the Hobbs Act that does not include interference with a right within "extortion" avoids some of these difficult constitutional issues under *Lopez* and *Morrison*.

### C. *Federal Criminal Statutes Should Always Be Read Narrowly*

A third rule of statutory interpretation at work in *Bass* and *Jones* and relevant to petitioners' claim is that of lenity. Lenity dictates that any ambiguity in the breadth of criminal statutes should be resolved in favor of narrowness, so as not to criminalize more activity than Congress intended. *Dowling v. United States,* 473 U.S. 207, 217-28 (1984) ("Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate."). As this Court recently explained, lenity rests on two underlying principles: 1) citizens should have fair warning of potential criminal liability for their actions; and 2) legislatures, not courts, should define criminal activity. *Bass*, 404 U.S. at 348. Though both principles are relevant to state criminal law, lenity is a particularly important consideration where federal statutes are concerned.



Applied to the case at hand, the rule of lenity compels a narrower interpretation of extortion than the Seventh Circuit's. Holding that interference with another's personal liberty to undergo abortion is equivalent to obtaining property broadens the meaning of extortion to encompass the familiar crime of coercion. "Extortion protects property; coercion protects autonomy." G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young: *Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 Am. Crim. L. Rev. 1345, 1600 (1996). The drafters of the Hobbs Act did not intend it to extend to coercion. The language of the Hobbs Act was borrowed from the criminal law of New York, as Representative Hobbs himself acknowledged. 91 Cong. Rec. 11900 (1945) (statement of Rep. Hobbs) ("The definitions in this bill are copied from the New York Code substantially."). The contemporary criminal law of New York, consistent with the common law, knew coercion and extortion as separate offenses. N.Y. Penal Law §§ 530, 851 (1909). This Court has held that when a legislature borrows the language of a statute from another jurisdiction, the language must be construed the way the other jurisdiction intended. *See Metropolitan R.R. Co. v. Moore*, 121 U.S. 558, 572 (1887) ("construed in the sense in which they were understood at the time in that system from which they were taken"). Extortion under the Hobbs Act, therefore, should protect the property interest that New York's extortion law protected, not the autonomy protected by its law of coercion.

## III. The Decision Of The Lower Court Interferes With The Policy Decisions Made In The Freedom Of Access To Clinic Entrances Act

In the Freedom of Access to Clinic Entrances Act

("FACE"), Congress protected the provision and receipt of "reproductive health services." It prohibited the use of force or threat of force or physical obstruction to attempt to injure, intimidate or interfere with any one trying to obtain or provide reproductive health services. 18 U.S.C. § 248(a). It provided for criminal penalties for those who violate those prohibitions, including a fine and a maximum sentence of one year for a first-time offender and three years for a repeat offender. 18 U.S.C. § 248(b). Lesser penalties are provided if the violation was a nonviolent one. *Id.* Civil actions may be brought "only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services." 18 U.S.C. § 248(c)(1)(A). Such plaintiffs may choose actual damages or statutory damages in the amount of $ 5,000 per violation. There are provisions for attorneys' fees (including the costs of expert witnesses), but not treble damages. Congress has not made a violation of FACE a predicate act under RICO.

When Congress has set up a very specific scheme for the vindication of a very particular right, this Court should be reluctant to interpret a different statute in a way that would render the detailed scheme meaningless. *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) ("Interpreting § 1981 to cover postformation conduct unrelated to an employee's right to enforce his or her contract, such as incidents relating to the conditions of employment, is not only inconsistent with that statute's limitation to the making and enforcement of contracts, but would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims"). Here, the Hobbs Act calls for criminal penalties of up to twenty years; FACE has a maximum penalty of three years. Because the Hobbs Act is a predicate act under RICO, the various restrictions on civil



actions in FACE can also be circumvented where a pattern of such violations can be alleged.[3]

The difference between FACE -- where Congress has specifically and unambiguously altered the balance between federal and state relations -- and the Hobbs Act could not be more stark. So, too, the constitutional issue appears in a much different light. FACE protects only one kind of commercial activity, one which Congress specifically concluded had a substantial effect on interstate commerce. *Hoffman v. Hunt*, 126 F.3d 575, 583 (4th Cir. 1997). Thus, it is perhaps more likely to survive constitutional challenge, even if the activity being regulated may not be economic. *Compare Hoffman v. Hunt*, 126 F.3d at 586-87 (upholding FACE because it regulated conduct "'closely and directly connected with an economic activity' -- the operation of abortion clinics") *with United States v. Bird*, 124 F.3d 667, 675 (5th Cir. 1997) (although FACE regulated non-economic activity, it was valid because it was "'an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity were regulated'").

In contrast, under the Seventh Circuit's interpretation, the Hobbs Act regulates "any robbery or extortion" that "affects" the "movement of any article or commodity in commerce," where "extortion" includes the interference in

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[3] To be sure, Congress specifically stated that FACE should not be considered an "exclusive" penalty or remedy for the conduct that it prohibited, but its focus appeared to be on not preempting *state* laws that protected the provision of reproductive health services. 18 U.S.C. § 248(d)(3) ("Nothing in this section shall be construed . . . to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies").

one's exercise of a right. Robbery and extortion are not commercial activities (and not closely related to a commercial transaction, as the extortionate collection of loans were for the statute considered in *Perez*); the Seventh Circuit's interpretation makes extortion even less so; and the connection to interstate commerce seems even weaker than the government's proffered connection in *Jones v. United States*. There are good reasons for not extending the Hobbs Act so far by judicial fiat. *See* Part II, *supra*. Those reasons are strengthened where Congress has passed a far more specific statute covering the particular misconduct in question.

## IV. The Interpretation Of The Court Below Creates Unnecessary First Amendment Problems

In concluding that the defendants "obtained" the property, the court below asserted that it was following long-standing Seventh Circuit precedent holding that all that was needed to meet the statutory definition was interference with a right. *National Organization of Women v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001) ("A loss to, or interference with the rights of, the victim is all that is required").

Statutes that prohibit "interference" inevitably create some First Amendment problems since one can interfere in all sorts of ways with another's goals, including with speech and petitioning activity. *E.g.*, *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988) (declaring the Hunter Harassment Act, which prohibited interference with the lawful taking of wildlife, unconstitutional). For example, the FACE statute discussed in the last section prohibits interference by threat of force with someone else's efforts to obtain or provide reproductive health services. 18 U.S.C. § 248(a)(1). Congress somewhat gratuitously asserted that the statute should not be interpreted to prohibit "expressive conduct . . .



protected from legal prohibition by the First Amendment" (18 U.S.C. § 248(d)(1)) or "to create new remedies for interference with activities protected by the . . . First Amendment" (18 U.S.C. § 248(d)(2)). Nonetheless, the Ninth Circuit has struggled with whether speech that contained no explicit threats nonetheless suggested a threat against abortion doctors in violation of FACE. *Compare Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1006 (9th Cir. 2001) (answering "no") *with Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 2002 U.S. App. LEXIS 9314 (9th Cir. May 21, 2002) (en banc) (answering "yes").

Similarly, the Fair Housing Act states:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the Fair Housing Act].

42 U.S.C. § 3617. Several courts have interpreted this provision to preclude petitioning government for discriminatory reasons. In *United States v. Scott*, 788 F. Supp. 1555 (D. Kan. 1992), for example, the district court adopted the United States's contention that the filing of a reasonably-based state court action to enforce the terms of a restrictive covenant requiring a home to be a single family dwelling for residential purposes violated Section 3617. The defendants in the federal action had tried to enjoin the purchase of the home by a group devoted to providing services for the disabled, and were concededly motivated by the handicap of

the future occupants. The court concluded that the act of issuing a letter threatening to enforce the restrictive covenant, and the filing of the lawsuit, constituted a violation of Section 3617. *Id.* at 1562.

In *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991), the district court concluded that the efforts of local private citizens to incorporate their neighborhood, which proposition was voted on and passed by 70% of the voters, would violate the Fair Housing Act if done to achieve discriminatory goals. (The complaint alleged that the activity was undertaken to prevent an Orthodox Jewish place of worship in the neighborhood.) *Id.* at 271-72.

Although these authorities are now a minority view,[4] they were the accepted view of the executive branch of the federal government (as *Scott* reflects) for many years. *See, e.g.*, Nat Hentoff, *HUD's Attack On The First Amendment*. Wash. Post, Sept. 17, 1994 at A-15; William Brand, *Speech Spells Trouble*, Oakland Tribune, July 21, 1994 at A-9 (quoting Justice Department spokesman: "If . . . someone goes to a public hearing and makes his or her view known . . . and somehow interferes with the fair housing act, Justice would sue that person"). The difficulty, of course, is that "interference" with a "right" can be construed to include actions taken through the political process to prevent

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[4] *White v. Lee*, 227 F.3d 1214, 1230 (9th Cir. 2000) ("In theory, § 3617 could be interpreted even more broadly, so that a wide range of speech regarding the housing rights of others could be investigated and sanctioned. One person's persuasive editorial on a zoning dispute, for instance, might well 'interfere' with another person's ability to secure housing. So construed, however, § 3617 would quickly run afoul of the First Amendment principles . . . "); *The Barnes Foundation v. The Township of Lower Merion*, 242 F.3d 151, 160-62 (3d Cir. 2001) (noting trend of authority).



housing from being built.

To be sure, when dealing with statutes like FACE and the Fair Housing Act, the problem must be addressed, and the conflict with First Amendment values must be resolved, because those statutes specifically prohibit "interference" (and Section 3617 of the Fair Housing Act prohibits interference with "rights"). But the Hobbs Act does not. It prohibits *obtaining* the *property* of another. By interpreting it to mean "interference" with "rights," the court below invited a whole series of free speech problems that easily can be avoided simply by interpreting the statute in a fashion more consistent with its actual terms. For this reason as well, the Seventh Circuit's broad reinterpretation of the statute should be rejected.

## CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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